Office-Supreme Court, U.S.
FILED
JUL 10 1981
ALEXANDER L. STEVAS,
CLERK

81-54

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HARVEY H. HEATH, *Petitioner,*

v.

STATE OF MISSISSIPPI, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Of Counsel:
ROBERT S. CRUMP, III

DONALD J. STEIGHNER
Attorney at Law
408 Third Avenue North
Columbus, Mississippi 39701
(601) 328-7984

July 10, 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

1. Whether the State of Mississippi deprived Petitioner of his liberty without due process of law by improperly refusing to allow his instruction on entrapment to go to the jury when the evidence at trial clearly showed that the Petitioner was induced to enter into the transaction involving the marijuana from a series of phone calls received from confidential informants and when absolutely no evidence was introduced by the State of Mississippi to show that Peititioner had any predisposition to commit such an offense.

2. Whether the State of Mississippi deprived Petitioner of his right to a jury trial by refusing to allow the issue of entrapment to be considered by the jury.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
REASON FOR GRANTING THE WRIT	5
THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT AS TO THE RIGHT OF A DEFENDANT TO A JURY TRIAL AND HIS RIGHT NOT TO BE DEPRIVED OF HIS LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW.	5
CONCLUSION	9
APPENDIX (Opinion And Judgment Of Supreme Court Of The State Of Mississippi)	1a

TABLE OF AUTHORITIES

Cases:	PAGE
Hampton v. *U.S.*, 425 U.S. 484	8
Osborn v. *U.S.*, 385 U.S. 323	8
Masciale v. *U.S.*, 356 U.S. 387	8
Sherman v. *U.S.*, 78 S. Ct. 819	8
Sorrells v. *U.S.*, 287 U.S. 435	8
Tribbett v. *State of Miss.*, 394 So. 2d 878	6, 7
U.S. v. *Russell*, 411 U.S. 423	7

CONSTITUTIONAL PROVISIONS:

The Constitution Of The United States, Amendment 14, Section 1	2, 5
The Constitution Of The United States, Article III, Section 2.(3)	3, 5

MISCELLANEOUS:

Entrapment To Commit Offense With Respect To Narcotics Law, 33 A.L.R. 2d 883	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. _____

HARVEY H. HEATH, *Petitioner,*

v.

STATE OF MISSISSIPPI, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

The Petitioner, Harvey H. Heath respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Mississippi entered in this proceeding on April 15, 1981.

OPINION BELOW

The opinion of the Supreme Court of the State of Mississippi, which appears in the Appendix hereto, is cited as and can be found at 396 So. 2d 1033, (Miss. 1981). No written opinion was rendered by the Circuit Court of Lowndes County, Mississippi.

JURISDICTION

The judgment of the Supreme Court of the State of Mississippi was entered on April 15, 1981. A petition for rehearing en banc was never made, therefore, no such order denying a rehearing exists. Petitioner retained present counsel on June 10, 1981, whereupon an Application for Additional Time in Which to File a Petition For Writ of Certiorari was filed within sixty-days from the date of the judgment entered by the Supreme Court of the State of Mississippi. This Court on June 16, 1981 entered an order extending time to file the petition for Writ of Certiorari until July 14, 1981, and this petition was filed within that time frame. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, Amendment 14:

Section 1. *Citizens of the United States.*

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the priviledges and immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Constitution of the United States, Article III:

Section(3)

> The trial of all crimes, except in cases of Impeachment, shall be by jury; and such trial shall be held in the State where said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

STATEMENT OF THE CASE

The case began on January 23, 1980, when Petitioner, Harvey H. Heath met with an undercover agent of the Bureau of Narcotics and a confidential informant named Freddie Fields at a restaurant called Sambo's in Columbus, Mississippi. There the details were worked out between them for the sale by Heath to the agent of One Hundred (100) pounds of marijuana at One Hundred Seventy-five Dollars (175.00) per pound. Prior to this meeting several phone calls were placed from the confidential informant, Freddie Fields, and another two phone calls from unidentified persons to the Petitioner, Heath, in the State of Alabama concerning this specific transaction. Petitioner's Co-Defendant, Joel Carroll, was not present at this meeting with the undercover agent nor was his name ever mentioned.

On January 22, 1980, the day before the transaction was to take place, Heath approached Carroll and asked to borrow Carroll's car, a 1976 Lincoln Continental. The two men swapped cars, with Carroll taking Heath's 1979 Toyota. They arranged to meet in Columbus, Mississippi on January 23, 1980. Carroll arrived at Leigh Mall in Columbus, Mississippi in Heath's Toyota. When the two men met Heath said he had to meet someone and asked to use his Toyota for this purpose. He then proceeded to

Sambo's meeting at this time. When he returned he told Carroll that he had another meeting and left in Carroll's Continental.

At the trial the State's theory was that Carroll was an accessory by allowing Heath to use his car to make the delivery of the marijuana.

Carroll testified that he had no knowledge of Heath's plan to sell the marijuana. He said it was not unusual to loan Heath the car and that he swapped for the Toyota on occasion. None of the State's evidence ever placed Heath and Carroll together on the day of the sale.

Heath testified and stated that Carroll had taken no part in the sale and had no knowledge of the marijuana being hauled in his car. In addition, Heath testified that he had indeed sold the marijuana to the agent, but that he had been induced to do the same because of several phone calls, at least one of those being from the Bureau's informant, Freddie Fields.

The trial court overruled the Defendant/Petitioner's motions for directed verdicts, premptory instructions, and motions for new trials. Joel E. Carroll and Harvey H. Heath were convicted in the Circuit Court of Lowndes County, Mississippi for the sale of more than one (1) kilogram of marijuana. Heath was sentenced to fifteen (15) years with the Department of Corrections and assessed a fine of $10,000.00 and Carroll was sentenced to a term of twelve (12) years and assesed a fine of $10,000.00.

On appeal, Carroll assigned as error:

1. That the trial Court erred in refusing to grant a Preemptory instruction of not guilty for the Appellant

Carroll and that the verdict of the jury was contrary to the great weight of the evidence.

2. The Court erred in refusing to grant the Appellant, Carroll's Motion for a New Trial because the State's Exhibit no. 8 was improperly admitted into evidence.

On appeal, Heath assigned as error;

1. That the trial Court erred in refusing to grant the Appellant, Heath's Motion for a New Trial because Instruction D-7 on entrapment was improperly refused.

The Supreme Court of Mississippi affirmed your Petitioner's conviction on April 15, 1981.

REASON FOR GRANTING THE WRIT

The Decision Below Conflicts With The Decisions Of The United States Supreme Court As To The Right Of A Defendant To A Jury Trial And His Right Not To Be Deprived Of His Liberty Or Property Without Due Process Of Law.

The Constitution of the United States, Amendment 14: Section 1. provides that no state shall deprive any person of life, liberty, or property, without due process of law; and Article III, Section 2, subsection 3 provides that the trial of all crimes . . . shall be by jury.

The Court below placed an unconstitutional burden on the Defendant and thus denied him his right to a trial by jury in conflict with cases previously decided by this Court in regards to the defense of entrapment and its submission to the jury.

In reliance on what it conceived to be a requirement of the presentation of a "prima facia" case of entrapment the lower Court upheld the trial Court's decision to deny the defendant an instruction that correctly and ac-

curately stated the law as to entrapment. The requested instruction stated:

> " 'Entrapment' means inducing or leading a person to commit a crime not ordinarily planned by them.
>
> Evidence has been presented that the Defendants were induced to commit the crime by law enforcement officers or their agents. For you to find the Defendant guilty, the state must prove to your satisfaction beyond a reasonable doubt that the Defendants were already willing to commit the crime and that the law enforcement officers or their agents merely gave them the opportunity."

The lower Court properly called the defense of entrapment an affirmative defense which must be raised by the defendant. However, the Mississippi Supreme Court confines its definition of entrapment in a narcotics case to its holding in *Tribbet* v. *State of Miss.*, 394 So. 2d 878, (Miss. 1981), where it stated that "the usual entrapment case which arises under Mississippi law involves a confidential informant or police officer who originates a sale of contraband by supplying it to the accused, who then, acting in complicity with the confidential informant or police officer, sells or disposes of it to another officer or person who initiates the prosecution." Id. at 822.

Likewise in its leading case on the issue of entrapment, *Tribbett* v. *State* used to deny the instruction sought in this case, the Mississippi Supreme Court stated "This Court (the Mississippi Supreme Court) has repeatedly held that a person making an unlawful sale of contraband is not excused from criminality by the fact that the sale was induced for the purpose of prosecuting the seller. . ." Id.

It is noted that in *Tribbett* the Court found that the defendant offered no evidence to establish his defense. Exactly the opposite was true in this case.

The trial Court, however, refused the entrapment instruction. The issue was never presented to the trier of fact, the jury.

In those cases where the United States Supreme Court has dealt with the issue of entrapment it has been long considered a basic and fundamental question of fact for the jury to see whether ". . . the criminal design originated with the government officials who 'may have implanted' in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *U.S.* v. *Russell*, 411 U.S. 423, 36 L. Ed.2d 366, 93 S. Ct. 1637.

The Mississippi Supreme Court has ignored the United States Supreme Court's holding in *Russell* that the principal element of the defense of entrapment is the defendant's lack of predisposition to commit the crime", and that "Entrapment occurs when the criminal design originates with government officials who implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute", Id.

It is well established throughout the United States Districts that "Ordinarily the defense of entrapment raises a question which should be submitted to the jury under proper instructions, this being particularly true where the testimony of the accused at face value sup-

ports the defense." 33 A L R 2d 883, 902. This is reinforced in *Sherman* v. *U.S.*, 78 S. Ct. 819, wherein the Court stated

> . . . the Courts of Appeals have since Sorrells unanimously concluded that unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused.

Id. at 823.

The record in this case along with the testimony of the defendant, Heath, is replete with evidence and facts of the intense activity of the then newly formed narcotics squad to induce Heath to enter this transaction. The record in Heath discloses no predisposition of Mr. Heath to engage in the activity, which is a necessary prequisite to a denial of the entrapment defense, therefore there could be and was a denial of Heath's due process rights. *Hampton* v. *U.S.*, 425 U.S. 484, 48 L. Ed. 2d 113, 96 S. Ct. 1646.

The Mississippi Supreme Court's consideration, interpretation and application of the defense of entrapment is also contrary to the United States Supreme Court's position on the issue in *Sorrells* v. *United States*, 287 U.S. 435, 53 S. Ct. 210; *Osborn* v. *United States* 385 U.S. 323, 87 S. Ct. 429; *Masciale* v. *United States*, 356 U.S. 387, 78 S. Ct. 827.

CONCLUSION

As the issue grows in constitutional importance nationally as well as in Mississippi, the time is here for the Supreme Court to issue a Writ of Certiorari to review the judgment and opinion of the Mississippi Supreme Court on the issue of entrapment, its use as a defense and a Defendant's right to have it properly considered under correct instructions by the jury prior to being shortstopped by the trial judge.

Respectfully submitted,

Of Counsel:
ROBERT S. CRUMP, III

DONALD J. STEIGHNER
408 Third Avenue North
Columbus, Mississippi 39701
Attorney for Petitioner

June 26, 1981

APPENDIX

IN THE SUPREME COURT OF MISSISSIPPI
No. 52,480

JOE E. CARROLL AND HARVEY H. HEATH

v.

STATE OF MISSISSIPPI

Before SMITH, LEE and BOWLING

LEE, JUSTICE, FOR THE COURT:

Joel E. Carroll and Harvey H. Heath were indicted, tried and convicted in the Circuit County of Lowndes County for sale of more than on (1) kilogram of marijuana. Heath was sentenced to fifteen (15) years with the Department of Corrections and assessed a fine of ten thousand dollars ($10,000) and Carroll was sentenced to a term of twelve (12) years and assessed a fine of ten thousand dollars ($10,000). On this appeal Carroll assigns two (2) errors and Heath assigns one (1) error in the trial below.

I.

Did the lower court err in refusing to grant a peremptory instruction of not guilty for appellant Carroll, and was the verdict of the jury contrary to the great weight of the evidence?

In January, 1980, the Lowndes County Narcotics Unit began an undercover drug operation in Columbus. On January 23, Narcotics Agent Rickey Peterson went to Sambo's Restaurant for a prearranged drug purchase of approximately one hundred (100) pounds of marijuana. Supporting him nearby and in contact by a body microphone on Peterson, was Officer Harold Dowdle. Inside the restaurant, Peterson and a confidential informer met with appellant Heath, who agreed to sell drugs to Peterson. At the latter's request, the three men left the restaurant and went to the parking lot where Heath was shown a large amount of money in Peterson's car and Heath agreed to make a sale to him in the Ramada Inn parking lot. Heath told Peterson he would be driving a silver Lincoln Continental and would be accom-

panied by someone with a high-powered rifle in the event anything went wrong. Another agent surveilled the transaction and followed Heath, who was driving a brown Toyota automobile, to the Lee Mall parking lot. At that point, Heath got out of the automobile and went inside the mall. A short while later, the agent saw Heath drive by him in a silver Lincoln Continental. That agent continued the surveillance of the brown Toyota until he received radio notice of Heath's arrest. He then went inside the mall and requested the information booth attendant to page the owner of the brown Toyota. Carroll answered the call, stated that the vehicle was his, and the agent identified himself and arrested Carroll as an accessory to the drug sale. Carroll then denied ownership of the Toyota. He was searched by the officer and a piece of paper was found in his wallet with the following figures on it: "$175.00 x 100." The marijuana sold by Heath was one hundred pounds at one hundred seventy-five ($175.00) per pound. A search of the vehicle did not reveal drugs, but a handgun was found.

At trial, Carroll testified that the owned the Lincoln Continental and that he loaned it to Heath in Alabama, but had no idea that Heath would use it to transport drugs. He further testified that Heath borrowed the automobile on January 22 and was to return it to him at the Lee Mall in Columbus, Mississippi, after lunch on the next day, January 23, and he only claimed ownership of the Toyota because it was in his possession and control at the time.

Heath testified that he had never sold marijuana before and did so only in response to repeated solicitation from the agents. He admitted that he purchased twelve thousand dollars ($12,000) to fourteen thousand dollars ($14,000) worth of marijuana on January 23 in Alabama and sold it to Agent Peterson later that day. According to him, Carroll had no knowledge of any drug deal and the figures on the paper found in Carroll's wallet were written by Heath and actually came from his wallet.

In determining whether a peremptory instruction should be granted and whether the verdict is contrary to the overwhelming weight of the evidence, the Court is required to accept as true all the evidence favorable to the State, together with reasonable inferences arising therefrom, to disregard that evidence favorable to the defendant, and, if such evidence will support a verdict of guilty beyond reasonable doubt, the peremptory instruction should be refused. Bullock v. State, 391 So. 2d 601 (Miss. 1980); Wright v. State, 387 So. 2d 735 (Miss. 1980); Saik v. State, 387 So. 2d 751 (Miss. 1980).

The evidence here is circumstantial and Carroll's connection with the sale may be proved by his actions and declarations and the circumstances surrounding them. Shanklin v. State, 290 So. 2d 625 (Miss. 1974). The burden was upon the State to prove Carroll's guilt beyond reasonable doubt and to the exclusion of every other reasonable hypothesis than that of his guilt.

Appellant Carroll relies upon *Cherry v. State*, 386 So. 2d 203 (Miss. 1980). That case, however, may be distinguished from the case at bar, since it involved constructive possession of marijuana at a time when it was undisputed that Cherry had been absent from the premises for a period of two weeks, during which time another person brought the marijuana to those premises. In the present case, the evidence indicates the following with reference to Carroll's connection and participation in the sale:

(1) Heath agreed to sell one hundred pounds of marijuana for one hundred seventy-five dollars ($175.00) per pound and three thousand (3,000) pills for fifteen hundred dollars ($1,500).

(2) He borrowed Carroll's Lincoln Continental car to transport the marijuana.

(3) He left his own car (the Toyota) with Carroll.

(4) Carroll met with Heath in a mall near the drug drop point on the day of and just prior to the drug sale.

(5) He remained at the mall where the marijuana was located in his Lincoln Continental while Heath made the sale connection.

(6) He initially claimed ownership of the Toyota when confronted, then denied ownership when arrested.

(7) He possessed a writing which contained figures corresponding to the exact weight and price of the marijuana.

(8) Heath admitted writing the figures on the paper which was found in Carroll's wallet.

We are of the opinion that the facts and inferences in this case presented issues for the jury to determine concerning Carroll's connection with the sale and his guilt or innocence resulting therefrom and that the court did not err in declining to grant the peremptory instruction of not guilty and in holding that the verdict was not contrary to the overwhelming weight of the evidence.

II.

Did the lower court err in refusing to grant Carroll's motion for new trial on the ground that State's Exhibit #8 was improperly admitted into evidence?

Exhibit #8 was the writing hereinabove referred to which was found in Carroll's wallet. The court permitted introduction of the instrument on rebuttal, which was objected to by Carroll. The trial judge has wide discretion in admitting rebuttal evidence. Pierre v. State, 364 So. 2d 1127 (Miss. 1978).

After overruling the objection, he permitted Carroll to introduce surrebuttal testimony, which overcame the prejudice which Carroll contends resulted from such evidence.

III.

Did the lower court err in refusing to grant Heath's motion for a new trial because Instruction D-7 was improperly refused?

The requested Instruction D-7 on entrapment follows:

" 'Entrapment' means inducing or leading a person to commit a crime not ordinarily planned by them.

Evidence has been presented that the Defendants were induced to commit the crime by law enforcement officers or their agents. For you to find the Defendant guilty, the state must prove to your satisfaction beyond a reasonable doubt that the Defendants were already willing to commit the crime and that the law enforcement officers or their agents merely gave them the opportunity."

The instruction was properly refused for the reason that the evidence did not make out a prima facie case of entrapment. *See* Tribbett v. State, 394 So. 2d 878 (Miss. 1981).

The judgment of the lower court is affirmed.

AFFIRMED.

PATTERSON, C.J., SMITH, P.J., ROBERTSON, P.J., SUGG, WALKER, BROOM, BOWLING and HAWKINS, JJ., CONCUR.